IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 5TH DECEMBER 2006 / 14TH AGRAHAYANA 1928

CRL.A.No. 159 of 2006()

SC.621/2004 of THE COURT OF THE ADDL. SESSIONS JUDGE(ADHOC-II) THODUPUZHA
CP.54/2004 of JUDL. MAGISTRATE OF FIRST CLASS COURT, DEVICOLAM

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APPELLANT:

YESUDAS, S/O.DAVID,
C.NO.9673, CENTRAL PRISON,
TRIVANDRUMF-695 012.

BY ADV. ADV.REENA ABRAHAM(STATE BRIEF.)

RESPONDENT:

THE STATE OF KERALA, REPRESENTED
BY A PUBLIC PROSECUTOR.

BY PUBLIC PROSECUTOR SRI.C.M.NAZAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 05/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.Thankappan, J.

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Crl. A. No. 159 of 2006

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Dated this the 5th day of December, 2006

JUDMENT

First accused in S.C.No.621/2004 on the file of the Court of the Addl. Sessions Judge (Adhoc-II), Thodupuzha is the appellant. He along with the 2nd accused were charge-sheeted for the offences punishable under section 8(1) and (2) of the Abkari Act. The prosecution case against the appellant is that on 31-8-1998 at 4.45 P.M. the appellant was found in possession 25 litres of spirit in a shed attached to his house bearing No.XIV/577 in Moonnar Panchayat. To prove the charge against the appellant, the prosecution examined PW1 to PW10 and Exts.P1 to P12 were marked. Material objects MO1 and MO2 were also marked. When the appellant was questioned under section 313 of Cr.P.C., he denied the allegation levelled against him. Relying on the evidence adduced by the prosecution, the trial court found that the appellant and the 2nd accused were guilty of the offences punishable under sections 55(a) of the the Abkari Act and they were convicted thereunder and sentenced to undergo rigorous imprisonment for two years each and to pay a fine of Rs.1,00,000/- each and in default of payment of fine to undergo rigorous imprisonment for a further period of three months each. The conviction and sentence awarded against the appellant are under challenge in this appeal.

2. The appeal is filed through the jail authorities. Since no counsel is appointed to defend the case of the appellant, State Brief has been appointed.

3. This Court heard learned counsel for the appellant and the learned Public Prosecutor.

4. Learned counsel for the appellant submits that the conviction and sentence awarded against the appellant are not sustainable on three grounds. Firstly, the trial court went wrong in placing reliance on the evidence of prosecution witnesses to find the appellant guilty of the offence punishable under section 55(a) of the the Abkari Act. Secondly, while seizing the contraband article and taking of the sample, the police officials have not complied with the procedure prescribed under the provisions of the Abkari Act as well as the Kerala Excise Manual. Thirdly, in view of the dictum laid down by this Court in a decision reported in Surendran V. Excise Inspector (2004(1) KLT 404, the finding of the trial court that the petitioner guilty under section 55(a) of the the Abkari Act is not sustainable.

5. The prosecution case as spoken to by PW1-Circle Inspector, Excise Special Squad and PW5-Preventive Officer is that on 31-8-1998 while PW1 and others were on patrol duty, they got information that the appellant and 2nd accused were engaged in the sale of spirit in their quarters

and on search a 35 litre can. which contained 25 litres of spirit. was found in a temporary shed attached to the quarters of the appellant and a 5 litre can, which contained 2 litres of arrack, in the house of the 2nd accused. PW1 stated that the appellant was arrested from the spot and the contraband articles were taken into custody under Ext.P1 mahazar. He also stated that the appellant, contraband articles and the records were entrusted to Excise Range Office, Devikulam. PW6, PW7 and PW8 are the Excise officials who continued the investigation. PW9 Village Officer who prepared Ext.P10 scene plan. PW10 filed the final charge before the court on getting chemical analysis report. PW2 and PW3 were examined to prove the seizure of contraband articles. They have not supported the prosecution case, even though they admit their signature in Ext.P1. PW4 Secretary, Munnar Grama Panchayat deposed that he issued Ext.P6 certificate certifying that the 2nd accused was in occupation of quarters No.XIV/582. Ext.P12 certificate issued by the Manager, Tata Tea Estate would show that room Nos.XIV/577 and XIV/582 were occupied by the appellant and the 2nd accused respectively.

6.It has to be noted noted that as per the evidence of PW1 and PW5, they have got information that the appellant and the 2nd accused were

engaged in the sale of spirit in their quarters. It has come out in evidence that on search made in the quarters of the appellant, no contraband article was found. It is alleged that the appellant had given a confession statement, which led to recovery of MO1 and MO2. It has to be noted that as per the evidence adduced by PW9, it can be seen that the shed from which the contraband article has been seized is different from that of the shed described in Exts.P1 and P10. The prosecution has not proved that the shed is exclusively occupied by the appellant or the 2nd accused. Though the offence was detected on 31-8-1998, the witnesses were questioned only in 2003. In the above circumstances, this Court is not in a position to place reliance on the evidence of PW1 to PW5 with regard to the ownership of the shed as well as the seizure of MO1 and MO2. The other witnesses namely, PW6, PW7, PW8 and PW10 who are official witnesses have not conducted any further investigation other than that of the investigation conducted by PW1 and PW4. In this context, it has to be borne-in-mind the two independent witnesses PW2 and PW3 who had signed Ext.P1 seizure mahazar turned hostile to the prosecution.

7.The next question to be considered is that of the delay in producing the contraband article before the court. Admittedly, though the

crime was detected on 31-8-1998, the material object, the contraband article and the sample were produced before the court only on 16-1-1999 after the lapse of more than four months. Though PW6 had stated that the delay was occurred due to work-load, this witness has stated that the contraband articles were kept in safe custody and key was with him. That by itself is not a reason to condone the delay in the light of a decision of this Court reported in Dominic V. State of Kerala (1989(1) KLT 601 and Narayani V. Excise Inspector (2002(3) KLT 725. In Dominic V. State of Kerala (Supra) this Court had taken the view that "**when S.36 of the Abkari Act and paragraphs 17,26, 34, 49 and 77 in the Manual are read together, as they should be, it is clear that seizure should be reported to the Court 'forthwith', and request made for sending a sample for analysis**'. A power is given to do a certain thing in a certain manner, the thing must be done in that way or not at all. It has come out in evidence that the contraband article was produced before the court only on 16-1-1999, after the lapse of more than four months of the detection of the crime. No proper explanation was given regarding the delay. There is no evidence to show that the sample and residue were kept in the proper custody till the date of producing the same before the court. Considering the facts and circumstances of the case, this Court is of the view that the evidence

adduced by the prosecution to prove the case against the appellant is not free from doubt.

8.In the light of the two grounds already found by this Court, this Court is of the view that the third ground need not be considered for the purpose of this appeal.

9.In the above circumstances, the conviction and sentence ordered against the appellant in S.C.No.621/2004 on the file of the Court of the Addl. Sessions Judge (Adhoc-II), Thodupuzha are set aside and the appellant is acquitted. The appellant shall be released forthwith unless required in any other case.

The appeal is allowed as above.

K. Thankappan,
Judge.

K. Thankappan,J.

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Crl.A. No. 159/2006

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Gist of the Judgment
5-12-2006